

No. 78-763

In the Supreme Court of the United States
OCTOBER TERM, 1978

GLEN L. RUTHERFORD, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

*ON CROSS-PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT*

MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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The judgment of the court of appeals in this civil case was entered on July 10, 1978 (78-605 Pet. App. 8a-9a), and rehearing was denied on August 4, 1978 (78-605 Pet. App. 10a). Petitioners did not obtain an extension of time within which to file a cross-petition. The time provided by 28 U.S.C. 2101(c) within which to file a petition for certiorari therefore expired on November 2, 1978. The cross-petition was not filed until November 7, 1978. The

time limit provided by Section 2101(c) is jurisdictional. *Department of Banking v. Pink*, 317 U.S. 264 (1942). It is therefore respectfully submitted that the cross-petition for a writ of certiorari should be denied.*

WADE H. McCREE, JR.
Solicitor General

NOVEMBER 1978

*As we noted in our petition for a writ of certiorari from the judgment below (*United States v. Rutherford*, petition for certiorari pending, No. 78-605, at 17-18), if this Court grants our petition, Rutherford may appropriately argue the questions presented in this cross-petition as alternative grounds for affirming the decision below. Accordingly, in light of this cross-petition, we intend to discuss those issues in our opening brief if this Court grants our petition. To the extent that the cross-petition seeks to challenge the court of appeals' refusal to permit the administration of Laetrile orally (see Cross-Pet. 9), it seeks to expand the relief granted by the court of appeals, and is barred by its untimeliness. See *Strunk v. United States*, 412 U.S. 434, 437 (1973); R. Stern and E. Gressman, *Supreme Court Practice* § 6.34 (5th ed. 1978).